IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1434 OF 2006

IN

SUIT NO. 269 OF 1991

THE BOARD OF TRUSTEES OF
THE PORT OF BOMBAY ... PLAINTIFFS.

VS.

SARAF PAPER MILLS & ANR. ... DEFENDANTS.

MR. N.J.MAKHIJA I/B. MULLA & MULLA FOR THE PLAINTIFF (TO SHOW CAUSE)

MS. F.SETHANA I/B. DUNMORR SETT FOR DEFENDANT NO.2 (IN SUPPORT OF NOTICE OF MOTION)

CORAM : S.K.SHAH, J.
JUDGMENT RESERVED ON 1-9-2006
JUDGMENT PRONOUNCED ON 15-9-2006

- : JUDGMENT : -

1. This motion is taken out by the defendant No. 2 for deleting defendant NO.2 from the array of the defendants.

2. The Plaintiffs have filed this Suit for recovery of the expenses of sale plus the custom duty and port trust charges. The Plaintiff is the Port Trust. The defendant NO. 1 the Company. The defendant No.2 is the

Steamer Agent. In May, 1985, the first defendant imported a consignment of one container of newspaper scrap. As such the first defendant were the importers/ owners/ the consignees of the said consignment. After the arrival of the vessel m.v. "M. Maersk", the consignment was unloaded and was kept in the Port of the Plaintiffs. The consignment was, however, not cleared within the prescribed period. Therefore, after notices to both the defendants, the Plaintiffs sold the consignment and adjusted the sale proceeds towards the dues of the plaintiffs. However, there was sale deficit, which remained unpaid. Therefore, the Plaintiffs filed the Suit for recover of the said amount.

3. As regards the second defendant, the Plaintiffs allege that the second defendant was the bailor of the said consignment, having discharged the same into the custody of the Plaintiffs. As such, the importers/ owners/ consignees, namely, the first defendant and the bailor, namely, the second defendant respectively, were hound and liable to take the delivery of the consignment and as they failed to do it, the Suit is filed against both of them, alleging that both the defendants are liable.

4. Neither the first defendant nor the second defendant has filed the written statement. The contentions raised by the second defendant in the

affidavit, in support of the notice of motion that the ground upon which the plaintiffs rest the case, as pleaded against the second defendant is that they are the shipping agents, who brought the consignment in a container was stored in plaintiffs premises. The second defendant further contends that they had at all material times acted as agent for the vessel at the Plaintiffs port and merely facilitated the loading and/or discharge of the cargo, including the said consignment. They further contend that the consignment was liable to be cleared by the owner/consignee. The cargo having been abandoned by the consignee does not render the second defendant liable in whatsoever manner and the suit is, therefore, not maintainable against the second defendant. It is further contended that the second defendant acted as an agent for a disclosed principal and at all material times as a matter well within the knowledge of the Plaintiffs, the second defendant has no independent liability either in law or in fact for the Suit claim.

. On these contentions, the present notice of motion is filed for dismissing the Suit as against the defendant No.2 and deleting the name of the defendant No. 2 from the array of the defendants.

5. I have heard the learned Counsel on both sides.

6. This application/ motion is made under Order 7

Rule 11(2) and under Order 1 Rule 10 of the Code of Civil Procedure. In essence, this motion is for deleting the name of the 2nd defendant, as there is no cause of action against them and, therefore, under Order 1 Rule 10 of the C.P.C. the name of the 2nd defendant is prayed to be deleted.

. It is pertinent to note that this motion has been taken out without raising any contentions by filing the written statement in the Suit. Therefore, it would be necessary to consider whether any cause of action arose for the plaintiff to file the Suit against the 2nd defendant and if there is no cause of action, whether the name of the 2nd defendant will have to be deleted from the array of the defendants.

7. The allegation of the plaintiff against the 2nd defendant are essentially in paragraph No. 5 of the plaint, wherein it is alleged that the 2nd defendant was the bailor of the said consignment, having discharged the same into the custody of the plaintiff- Port Trust. As such being the importers/ owners/ consignees and bailor the defendants were bound and liable to take the delivery and clear the consignment; but having failed to do so, the Suit came to be filed against both the defendants for recovery of the suit dues/ claim.

. It has to be noted that to these averments, no contentions have been raised by the 2nd defendant by

filing the written statement in the Suit disputing that position.

8. The learned Counsel representing the second defendant, vehemently contended that the 2nd defendant being the Steamer Agents were not liable even for taking the delivery of the consignment as the first defendant being the owner of the consignment, was disclosed. The learned Counsel submitted that under the provisions of Section 230 of the Contract Act, there is no liability on the agent when the principal is disclosed. In support, she has relied on two decisions of this Court, rendered in case of *MIDLAND OVERSEAS VS. m.v."CMBT Tana" & Ors. reported in 19989(3) ALL MR 662* and the decision rendered in *NOTICE OF MOTION NO. 3811 OF 1999 IN SUIT NO. 2805 OF 1991.* In both these cases, this Court held that from the averments made in the plaint, it was clear that the Suit was instituted against the 2nd defendant (Steamer Agent) in his capacity as agent of the first defendant (owner of the consignment) and in no other capacity and, therefore, when the principal was disclosed, in view of Section 230 of the Contract Act, the agent was not liable to take delivery or pay the charges to the Port Trust.

9. As against this, the learned Counsel for the Plaintiff points out two judgments of this Court, one rendered in Suit No. 2026 of 1981 (By Sathe, J.) and another in Writ Petition No. 1732 of 1990 (By Mohite,

J.), held that the Steamer Agent was liable to take delivery and also to pay charges of the Port Trust, essentially, when there was no evidence to show that there were instructions given by the 2nd defendant to the Port Trust for making delivery of the goods to the owner. The learned counsel for the Plaintiff, therefore, submits that there is nothing to show that the 2nd defendant being the Steamer Agent had discharged the vessel into the Custody of the Port Trust and also endorsed the Bill of lading or issued the delivery Order, whereby it could be said that the agent was discharged from the liability of taking the delivery of the goods. He submits that it is only when such endorsement is made, the agent ceases to become liable for taking delivery. He further submits that delivery of the goods has been taken by the Port Trust only as per the instructions of the Steamer Agent, who got the goods unloaded from the ship. He, therefore, contends that the second defendant being the Steamer Agent was the bailor of the goods kept in the custody of the Port Trust. Even in that capacity, the second defendant was liable under the provisions of Section 148 of the Contract Act.

10. The learned Counsel for the 2nd defendant, however, submits that the Steamer Agent may be acting as an agent to facilitate the lading and/or discharging the cargo, his liability has to be cleared by the owner / consignee thereof. If the Cargo is abandoned by the

consignee, the second defendant does not become liable. She also points out that under the provisions of Section 59 to 63 of the Major Port Trusts Act, 1963, the responsibility of taking delivery and paying freight and other charges is on the owner of the consignment / the owner (the first defendant). She also further submits that the Steamer Agent is not covered by the definition of "Owner" given in Section 2(o) of the Port Trusts Act and, therefore, in her submissions, the Steamer Agent not being liable to take delivery of the goods, is also not liable to pay any charges to the Port Trust.

11. As against this, the learned Counsel for the Plaintiffs submits that the Steamer Agent being the person authorising unloading of the goods and keeping those goods with the Port Trust, is a bailor and his liability is not discharged until he endorses the bill of lading / delivery authorising the Port Trust to make delivery of the goods to the consignee.

12. The above submissions, therefore, take me to the definition of "Owner" incorporated in Section 2(o) of the Port Trusts Act. The definition reads thus ;-

> 2(o) : "owner" (i) in relation to goods, includes any consignor, consignee, shipper or agent for the sale, custody, loading or unloading of such goods; and (ii) in relation to any vessel or any aircraft making use of any port,

includes any part-owner, charterer, consignee or mortgagee in possession thereof."

. The definition of "owner" therefore includes ’ an agent for the sale, custody, loading or unloading of such goods". The contention of the learned counsel for the second defendant is that the second defendant is not the person who got the consignment unloaded. In her submission the second defendant being the Steamer Agent has only to fill in the forms and submit them to the Port Trust.

13. Having considered all these contentions, it is clear from the definition of "owner" that the said definition includes the agent for loading or unloading of the consignment. Therefore, it would be necessary to see whether the second defendant in this Suit could be said to be the person responsible for unloading of the consignment.

14. To get this position cleared, I have called upon the parties to produce particular Form which is required to be filled in by a Steamer Agent. That form is produced on record, which is marked "X" for identification. This form is required to be signed by the agent and addressed to the Port Trust. IN the beginning of the form itself, it is mentioned " We request you to kindly arrange Berthing/ Unberthing/ shifting the captioned vessel". All details of the

consignment are required to be filled in this form. It is upon this form, that the unloading of the goods begins. It is, therefore, clear that it is at the instance of the Steamer Agent that the Port Trust allots the berth for a steamer/ vessel and also for getting unloading of the consignment. It is not necessary that actually the agent should get the consignment unloaded. It is the job of the Port Trust but obviously it is done at the instructions of the steamer agent. Thus it is clear that the Steamer Agent is a person who is getting the consignment unloaded from the Steamer/ vessel and authorising the Port Trust to get the goods in its custody. Therefore, the Agent is covered under the definition of "Owner" incorporated in Section 2(o) of the Port Trusts Act.

15. So far as the aforesaid two decisions of this Court are concerned holding that when the principal is disclosed by the agent, under the provisions of Section 230 of the Contract Act, the agent is not liable. In both these cases, this Court had discharged the Steamer Agent and his name was deleted from the Suit. However, that was done after perusing the allegations that were made in the plaint in both the Suits. In both the decision, it is clearly observed that on the basis of the allegations, it was clear that the Steamer Agent had merely acted as a general agent for the disclosed principal and it is on the basis of those averments that the Steamer Agent was discharged. However, in the

present case, there is a clear averment in the plaint that second defendant being the bailor of the goods, at whose instance the goods were unloaded and lodged with the Bombay Port Trust and it is in that capacity also the second defendant is liable. This position, however, was not before the learned single Judges in the aforesaid two decisions. Moreover, the other two decisions rendered by the Single Judges (Sathe J. and Mohite, J.) in different two matters, held that the Steamer Agent was liable.

16. I have no reason at this stage of the Suit to take different view than the one which is taken by Sathe, J. and Mohite J. Moreover, the allegations against the second defendant being bailor also apparently sets out a cause of action against the second defendant under the provisions of Section 148 of the Contract Act. This Suit, therefore, cannot be presumed to be without having cause of action against the second defendant. There is also nothing on record to indicate that the second defendant had duly endorsed the bill of lading, authorising the delivery to be made to the consignor.

17. In this regard, the Apex Court in case of *TRUSTEES OF THE PORT OF MADRAS THROUGH ITS CHAIRMAN VS. K.P.V.SHEIKH MOHD. ROWTHER & CO. PVT. LTD. & ANR., reported in (1997) 10 Supreme Court Cases 285,* clearly observed as under :-

"Once the goods are handed over to the Port Trust by the steamer and the steamer agents have duly endorsed the bill of lading or issued delivery Order, their obligation to deliver the goods personally to the owner or the endorsee comes to an end." It is also observed that :-

" by the endorsement of the bill of lading or the issue of a delivery order by the endorsee, and thus it appears to be clear that the steamer or the steamer agents are not responsible for the custody of the goods after the property in the goods passes to the consignee or endorsee till the Customs authorities actually give a clearance."

18. Under these circumstances, at this stage, it cannot be said that the Plaintiffs have no cause of action against the second defendant for filing the Suit for recovery of sale deficit amount. As such, the name of the second defendant is not required to be deleted under Order 1 Rule 10 of the Code of Civil Procedure. Therefore, I do not find any merit in this notice of motion. The Notice of Motion is, therefore, dismissed.

....

[S.K.Shah, J.]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL JURISDICTION

NOTICE OF MOTION NO. 1434 OF 2006
IN
SUIT NO. 269 OF 1991

Date of Decision : September 15, 2006

For Approval and Signature :

The Honourable Mr. Justice S.K. Shah :

1. Whether Reporters of Local Papers may be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the

Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copy of the Judgment should be sent to Nagpur, Goa and Aurangabad office?

*****

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1434 OF 2006
IN
SUIT NO. 269 OF 1991

THE BOARD OF TRUSTEES OF
THE PORT OF BOMBAY ... PLAINTIFFS.
VS.
SARAF PAPER MILLS & ANR. ... DEFENDANTS.

CORAM : S.K.SHAH, J.
JUDGMENT RESERVED ON 1-9-2006
JUDGMENT PRONOUNCED ON 15-9-2006

P.C.

For the reasons separately recorded in the Judgment, the Honourable Court pleased to pass the following Order:-

ORDER

"The Notice of Motion is, therefore, dismissed."

.....

Sd/-
[S.K.SHAH, J]

D.V.GODBOLE,
P.A. TO S.K.SHAH, J.